Nos. 90-711 and 90-712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LAWRENCE C. PRESLEY, individually and on behalf of others similarly situated,

Appellant,

v.

ETOWAH COUNTY COMMISSION,

Appellee.

ED PETER MACK, and NATHANIEL GOSHA, III, individually and on behalf of others similarly situated,

Appellants,

v.

RUSSELL COUNTY COMMISSION,

Appellee.

On Appeal from the United States District Court for the Middle District of Alabama

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BRIEF OF APPELLEE ETOWAH COUNTY COMMISSION

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STATEMENT

For a number of years prior to 1986, Etowah County was governed by a five-person County Commission. During this time period, there were four commissioners, who were elected at large but resided in each of four districts, and a chairman, who was also elected at large. In addition to voting on matters within the Commission's general jurisdiction, the primary responsibility of each indi-

vidual commissioner was supervising maintenance of roads and bridges within his district through a separate district "road shop." The chairman was primarily responsible for other functions, including preparation of the county budget and management of the county courthouse building and grounds.

In 1986, the County signed a consent decree in *Dillard v. Crenshaw County*, No. 85-T-1332-N (M.D. Ala. Nov. 12, 1986), in which it agreed to phase in a single-member-district structure. The decree, which was duly precleared by the Attorney General under section 5 of the Voting Rights Act in October 1986, called for creation of six commissioner districts and eventual elimination of the separate office of chairman. Pursuant to the decree, two new commissioners, including appellant Presley, were elected by the residents of new districts 5 and 6 in December 1986. They joined the four incumbent commissioners in January 1987. At the same time, the incumbent chairman relinquished his vote but was authorized to remain in office until 1993[1]

These changes required the Commission to address the issue of how the duties of commissioners should henceforth be assigned. In so doing, it faced two realities. First, Commissioner Presley's new district contained only 2.6 miles of county road, constituting only .3% of the total county road mileage.[2] This disparity was a direct result of the effort to create a black-majority district in a county where most blacks lived within city limits.[3] Second, there were still only four "road shops" and it

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[1] Two more single-member-district seats—those in districts 2 and 3—were filled by two incumbent commissioners in elections held in 1988. The final two new seats were to be filled in 1990.

[2] J.A. 72. The other new commissioner's district contained 35.22 miles of county road, constituting four percent of the total. *Id.*

[3] Roads within incorporated municipalities are separately maintained and funded by the municipalities themselves.

would have been costly and inefficient to create six shops corresponding to the six new districts. J.A. 64-65.

The County Commission, in August 1987, responded to these realities by enacting two resolutions. One, the "road supervision resolution," provided that the four holdover commissioners would continue to oversee their four road shops and would "jointly oversee, with input and advice of the County Engineer, the repair, maintenance and improvement of streets, roads and public ways of all of Etowah County." J.S. App. A-48. The two new commissioners were simultaneously given duties that had previously belonged to the chairman. Commissioner Presley became supervisor of the courthouse complex, Commissioner Williams was responsible for the engineering department, and the two of them were jointly responsible for the county farmers' market. *Id.*[4]

The second resolution—the "common fund resolution" here at issue—altered the system for allocating funds to road maintenance. Under the former system, the County Commission would annually allocate a sum of money for road maintenance to each of the four old road districts and the commissioner for each district retained control over the spending of that money in his district during the year. The money at issue came from state taxes earmarked specifically for road repairs. In practice, these allocations typically reflected the miles of county road in each district.[5]

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[4] The number of county employees under Mr. Presley's supervision at the courthouse, and the budget he administered, approximately equaled the number of employees and expenditures at each of the road shops. J.A. 62-63, 72, 75.

[5] *See* Hitt Depos. at 21 (noting that district allocations were "more or less" equal but varied based on the road mileage in each). Appellants suggest that funds were simply divided equally among the four districts, Br. at 5, citing only to the Hitt deposition, which, as just noted, indicates otherwise. *See also* J.S. App. A-19 ("We find as a matter of fact . . . that the individual commissioners were

Under the common fund resolution, the practice of making general allocations of funds to separate districts was abolished. Under the new system, "all monies earmarked and budgeted for repair, maintenance and improvement of the streets, roads and public ways of Etowah County" were "placed and maintained in common accounts" to be "used county-wide in accordance with need." J.S. App. A-49. Thus, the Commission as a whole undertook to make decisions about the expenditure of road maintenance funds on projects throughout the County.

This case was filed on May 5, 1989. The original complaint charged that Etowah County and Russell County had engaged in racial discrimination in the governance of road maintenance operations in violation of the Fourteenth and Fifteenth Amendments, Title VI of the Civil Rights Act of 1964, and section 2 of the Voting Rights Act, 42 U.S.C. § 1973.[6] Claims under section 5 of the Voting Rights Act were then added and a three-judge district court was convened to consider those new claims first. *See* 42 U.S.C. § 1973c. The district court resolved the section 5 issues based on a factual record submitted in the form of depositions, affidavits, and exhibits.

On August 1, 1990, the three-judge court ruled unanimously that the "road supervision resolution" should have been precleared under section 5. It reasoned that, prior to 1987, all voters in Etowah County "participated in

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never, prior to the common fund resolution, given equal prorated shares of the budget over which they could exercise exclusive individual control, such that subsequent shifts in budget allocation among the districts proceeded on some kind of 'horse-trading' basis.")

Some major road projects, such as paving unpaved roads, were handled through contracts with private firms, which, after a bidding process, were individually approved by the Commission as a whole. J.A. 53-54, 65-66.

[6] All claims against a third defendant, Escambia County, were later voluntarily dismissed.

choosing the commissioners responsible for road management" (*i.e.*, the four commissioners elected at large), whereas "the 1987 resolution stripped the voters in districts 5 and 6 of any electoral influence over such commissioners." J.S. App. A-20. The court did not determine whether the resolution "had an actual discriminatory purpose or effect," *id.* at A-21, but concluded that the "change had such a *potential*," *id.* (emphasis in original), and thus should have been precleared.

By contrast, the district court also ruled that the common fund resolution did not require preclearance. The majority opinion, authored by Circuit Judge Frank Johnson, held that "the reallocation of authority embodied in the common fund resolution was, in practical terms, insignificant" since the entire Commission, "both before and after the disputed change," had the authority to "allocate funds among the various districts, and thus to effectively authorize or refuse to authorize major road projects on the basis of a county-wide assessment of need." J.S. App. A-19.[7] The court acknowledged that, prior to the resolution, "the individual commissioners may have been able to set priorities regarding the expenditure of whatever portions of the road budget the entire Commission saw fit to allocate to their respective districts." *Id.* It reasoned, however, that this power "pales dramatically" in comparison to the power, always held by the entire Commission, to determine the amount of money to be spent in each district. *Id.* Thus, the "common fund resolution effected no shift in authority between officials with different constituencies as to the overwhelmingly decisive and controlling budgetary powers exercised by the Etowah

[7] The court also held that section 5 generally is not triggered where powers shift among officials with the same constituency. J.S. App. A-10 to A-14. This principle formed the basis of the majority's companion holding that section 5 was not triggered by Russell County's shift of road-maintenance authority from its County Commission to an appointed official answerable to that Commission. *See id.* at A-16 to A-18.

County Commissioners, because such ultimate budgetary powers have always been exercised by the entire Commission." *Id.*

The court went on to reject the suggestion that it had intruded improperly into assessing the merits of the section 5 claims in this case. Noting "that reallocations of authority *as such* do not, without more, have any obvious relation to voting rights," *id.* at A-22 n.21 (emphasis in original), it stated that in assessing the preclearance issue in this case it was "tread[ing] a path at the far edges of the domain of section 5 law," *id.* The preclearance issue presented here, in the court's view, required it to "reach and decide the inherently factual threshold issue of whether the disputed reallocations of authority had any significant potential impact on voting rights." *Id.* Judge Thompson, in dissent, argued that the common fund resolution should have been precleared. He contended that the resolution cannot be considered separately from the road supervision resolution and that the two resolutions together can be viewed as part of a scheme to deprive the two newly elected commissioners of any role in road maintenance operations. *Id.* at A-28 to A-33.

Appellant Presley appealed to this Court from the district court's holding that preclearance of the common fund resolution was not required.[8] Appellee Etowah County Commission did not cross-appeal from the ruling with respect to the road supervision resolution.[9] This Court noted probable jurisdiction on May 13, 1991.

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[8] The plaintiffs challenging the actions of Russell County brought a parallel appeal from the district court's ruling that Russell County's shift of control over road operations from its commission to an appointed official also did not require preclearance.

[9] This decision was based on the fact that the road supervision resolution was effectively superseded by a subsequent 1990 resolution. J.A. 50-52. That resolution provided that significant road projects would continue to be funded by the Commission as a whole, based on the recommendations of the County Engineer, while com-

SUMMARY OF ARGUMENT

1. Section 5 of the Voting Rights Act requires preclearance of all new standards, practices, or procedures "with respect to voting." 42 U.S.C. § 1973c. On its face, this statute cannot fairly be read to apply to enactments that, without altering the *electoral* process in any way, reallocate power or authority among incumbent officials. Nor is there any support for such a strained interpretation in the legislative history.

The Court's decisions applying section 5 have been consistent with the statutory language, drawing a line between changes that directly affect elections and other changes in governmental policies or practices. Thus, while the Court has interpreted the statute to cover many different types of changes affecting the electoral process, *see, e.g., NAACP v. Hampton County Election Comm'n*, 470 U.S. 166 (1985) (change in scheduling of election); *Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. 32 (1978) (requirement that public employees take unpaid leave when running for office); *City of Richmond v. United States*, 422 U.S. 358 (1975) (annexation), it has not required preclearance of other legislative policy judgments, *see Lucas v. Townsend*, 110 S. Ct. 858 (1990) (school board decision to combine three capital projects in a single bond referendum). Moreover, the Court has never held that a reallocation of official authority, without more, constitutes a change affecting "voting." Nor has

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missioners in all six districts would have individual control over minor matters such as filling potholes and grass cutting. *Id.* It continued to assign routine supervision of the four road shops to the four commissioners previously handling this task, but did not contain language comparable to paragraph 7 of the road supervision resolution, J.S. App. A-48, which had authorized these four commissioners to "jointly oversee" road operations in the County.

The district court ruled that the 1990 resolution did not moot the preclearance issue with respect to the road supervision resolution because it did not "entirely undo the changes wrought by the 1987 resolution." J.S. App. A-21 n.20.

the Department of Justice adopted such a view in a consistent or well-considered way.

2. It defies common sense to argue that Congress intended to require preclearance of all laws that, like the Etowah County common fund resolution, can be viewed as shifting power among elected officials. To begin with, such a rule would enlarge the scope of this unique procedure to almost unimaginable proportions. A vast number of enactments each year alter in some way the allocation of authority between the legislative and executive branches in covered jurisdictions, or move power between the state level and the local level. As a result, appellants' proposed rule would greatly heighten the federalism concerns that are inherent in a procedure requiring advance federal approval of new state or local laws and practices.

The rule would also create enormous line-drawing problems. Having abandoned the current line—between changes that directly affect elections and those that do not—the Court would face the insuperable task of devising standards for determining which new laws create a net change in the authority of elected officials.

Finally, the "effects" test incorporated by Congress into section 5 would not work in an intelligible way outside the electoral context. Surely Congress could not have intended the Justice Department to make subjective determinations about which reallocations of authority have the effect of shifting power from officials who are appropriately "responsive" to minority concerns to others who are not. Nor would a more objective approach—focusing on the proportion of minorities in each official's constituency—be workable. That approach would prevent covered jurisdictions from transferring authority, for *any* reason, from an official or body with a larger minority constituency to an official or body with a smaller one.

It would make far more sense to conclude that Congress intended cases like this one to be litigated in conventional

lawsuits under the Fourteenth Amendment or some other applicable provision. Such an alternative remedy avoids all of the practical problems just outlined, and likely would be much more effective than asking the Justice Department to uncover a handful of racially motivated subterfuges in a mountain of new requests for preclearance of routine state and local enactments.

3. For several reasons, it would be particularly inappropriate to treat the common fund resolution as a threat to "voting rights" that requires preclearance. First, at most, it was a revocation of a previous discretionary delegation of authority by a legislative body. The withdrawal of such a delegation does in one sense affect the authority of the delegee, but it does not change the balance of *power* between the legislative body and that executive official. Thus, both before and after the withdrawal, voters retain the same right to vote for the body with the final authority and control—the legislature.

It would also be pointless to require preclearance of express revocations of delegated authority. Legislatures could achieve the same result by cutting, or threatening to cut, the budget of the official involved. But, under any theory, a decision about *budgetary* priorities cannot fall within the scope of section 5.

Finally, contrary to the assumption of the district court, this was a case where authority was always in the hands of officials or bodies with the same constituency. In such a case as well, it makes no sense to suggest that a reallocation of authority among officials poses a threat to voting rights. The voters retain exactly the same level of influence both before and after the change.

ARGUMENT

Under section 5 of the Voting Rights Act, a covered jurisdiction must preclear every change in its laws or practices relating to "voting." The Court is now being asked to extend this rule to every change in the "authority" possessed by any elected official. This proposal, however, requires both a strained reading of the statute and a major departure from this Court's existing precedents. It further requires the insupportable assumption that Congress intended the Voting Rights Act to be an instrument for federal review of a vast range of state and local policy decisions outside the electoral context, utilizing standards that make no sense outside that context. For these reasons, the Court should reject appellants' unnatural reading of the statute, and continue its current practice of requiring preclearance only when a jurisdiction makes a change directly affecting the *electoral* process.

I. PRECLEARANCE OF CHANGES IN THE AUTHORITY OF INDIVIDUAL ELECTED OFFICIALS IS REQUIRED NEITHER BY THE STATUTORY LANGUAGE NOR BY THIS COURT'S PRECEDENTS.

This case calls on the Court, for the first time, to apply section 5 of the Voting Rights Act to legislation that did not affect the conduct of elections in any way but simply altered the independent authority of particular elected officials. Appellants argue that the common fund resolution transferred the power to control expenditure of road funds from individual commissioners to the County Commission, and further contend that every such "reallocation of authority" poses a threat to voting rights and must be precleared. Such a rule, however, is justified neither by the statutory language nor by the governing case law.

Section 5 prohibits covered jurisdictions from imposing any new "voting qualification or prerequisite to vot-

ing, or standard, practice, or procedure with respect to voting" until a court or the Attorney General determines that the change has neither a purpose nor an effect of "denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. This language, on its face, renders appellants' position highly problematic. It is hardly a natural reading of the statute to treat a change in the power of an incumbent official as a "standard, practice, or procedure with respect to voting" that should be reviewed to determine whether it abridges the "right to vote." To the contrary, as this Court has noted, "'[t]he language of § 5 clearly provides that it applies only to proposed changes in *voting* procedures.'" *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983) (emphasis supplied) (quoting *Beer v. United States*, 425 U.S. 130, 138 (1976)).

Not surprisingly, neither appellants nor the United States offer a shred of legislative history indicating that Congress ever intended section 5 to cover transfers of authority among officials. The reason, of course, is that Congress never thought it was regulating anything other than the electoral process. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) ("The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the *election law* of a covered State in even a minor way.") (emphasis supplied).[10] In passing a law expressly aimed at the protection of "voting rights," it saw a clear distinction between this discrete problem and all other aspects of governmental operations that might be perceived as discriminatory.

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[10] *See also* H.R. Rep. No. 439, 89th Cong., 1st Sess. 26 (1965) (section 5 "deals with attempts by a State or political subdivision . . . to alter . . . *voting qualifications and procedures*") (emphasis added); S. Rep. No. 417, 97th Cong., 2d Sess. 5-6 (1982) (accompanying extension of statute) ("The Act also required covered jurisdictions to preclear any changes in *voting or elections laws* . . . .") (emphasis added).

In this Court's own decisions interpreting section 5, it has drawn the same line—authorizing coverage of all matters relating to elections but not of other types of changes in governmental policies or practices. The Court began its examination of the scope of the statute in *Allen v. State Bd. of Elections, supra.* The main issue there was whether the statute applies to all aspects of the electoral process or, as Justice Harlan argued in dissent, *id.* at 582-93, applies only to restrictions on the ability of citizens to register to vote.[11] The Court opted for the more expansive approach, concluding that section 5 "was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Id.* at 565. But it never suggested that the statute might apply to a change that does not in some way affect elections.

Since *Allen*, the Court's decisions have been consistent in this regard. It has recognized that the "purpose of § 5 has always been to insure that no *voting-procedure* changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the *electoral franchise.*" *City of Lockhart v. United States*, 460 U.S. at 134 (emphasis supplied) (quoting *Beer v. United States*, 425 U.S. at 141). Thus, for example, section 5 has been applied not only to changes affecting voter eligibility but also to changes in electoral districts,[12] the racial composition of the elec-

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[11] As an historical matter, Justice Harlan's interpretation may well have been closer to what Congress actually had in mind in 1965. *See* Report of the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, *reprinted in* S. Rep. No. 417, 97th Cong., 2d Sess. 118-23 (1982); Thernstrom, *The Odd Evolution of the Voting Rights Act*, 55 Pub. Interest 49, 52 (1979); Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 680-82 (1983).

[12] *See Georgia v. United States*, 411 U.S. 526 (1973).

torate,[13] candidate eligibility requirements,[14] the location of polling places,[15] the timing of elections,[16] or the number of offices available.[17] In all these cases, there was a direct linkage between the change at issue and either (1) the pool of authorized voters, (2) the terms on which they could participate in the process, or (3) the candidates they could select from. *See Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. 32, 52-53 (1978) (Powell, J., dissenting) ("In *Allen*, as in each of the cases relied upon today, the Court was considering an enactment relating directly to the way in which elections are conducted . . . .").[18]

More recently, the Court has drawn this line directly, by summarily affirming in *Lucas v. Townsend*, 110 S. Ct. 858 (1990). The court below in *Lucas* held that section 5 was inapplicable to a school board's decision to propose three capital projects as part of a single bond referendum rather than three separate ones. It reasoned

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[13] *See City of Richmond v. United States*, 422 U.S. 358 (1975).

[14] *See Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. 32 (1978); *Allen v. State Bd. of Elections*, 393 U.S. at 570.

[15] *See Perkins v. Matthews*, 400 U.S. 379, 387 (1971).

[16] *See NAACP v. Hampton County Election Comm'n*, 470 U.S. 166 (1985).

[17] *See City of Lockhart v. United States, supra.*

[18] *Dougherty County*, involving a requirement that public employees take unpaid leaves when they run for elective office, probably is the decision reading section 5 most expansively—since the rule at issue was a personnel regulation rather than part of any election law. Even there, however, there was an explicit nexus between the rule and the electoral process, since the rule specifically affected the financial burdens associated with candidacy for public office. Moreover, in *Dougherty County*, four justices stated in dissent that it "tortures the language of the Act to conclude that this personnel regulation, having nothing to do with the conduct of elections as such, is state action 'with respect to voting.'" *Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. at 51 (Powell, J., dissenting).

that such a decision involved substantive governmental policy, not voting.[19] The United States, in urging affirmance in *Lucas*, drew precisely the same distinction[20] and argued that the "decision to combine these projects [was] a policy decision . . . essentially no different from a legislative committee's decision to include only a certain combination of projects in an appropriations bill, or not to include any of them." Br. for the United States as *Amicus Curiae* at 11, *Lucas v. Townsend*, 110 S. Ct. 858 (1990) (No 89-400). As such, "it was not a voting matter within the purview of Section 5." *Id.*

Having recognized the distinction between electoral changes and other aspects of governmental policymaking, the Court has never indicated that reallocations of authority among officials fall into the former category. Appellants' efforts to show otherwise are unavailing. They point to the Court's expansive interpretation of section 5—"to reach any state enactment which altered the election law of a covered State in even a minor way," *Allen v. State Bd. of Elections*, 393 U.S. at 566—but

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[19] *See Lucas v. Townsend*, 698 F. Supp. 909, 911 (M.D. Ga. 1988), *aff'd mem.*, 110 S. Ct. 858 (1990) ("'the normal formulation of policy by elected representatives, *e.g.*, setting employees' salaries, hiring employees, adopting capital budgets, [does] not constitute [a change] affecting voting, even though [the decisions] result in the exercise of discretion and even though a referendum may be required for final decision'") (quoting the Brief of the United States as *Amicus Curiae*) (brackets in original).

The district court also held that the board's action was not a "change," for purposes of section 5. *Id.* at 912. But the United States has recently argued persuasively that this alternative holding likely was not the basis of this Court's summary affirmance. *See* Br. for the United States as *Amicus Curiae* at 13-15, *Board of Pub. Educ. & Orphanage for Bibb County v. Lucas*, 111 S. Ct. 2845 (1991) (No. 90-1167).

[20] *See* Br. for the United States as *Amicus Curiae* at 9, *Lucas v. Townsend*, 110 S. Ct. 858 (1990) (No. 89-400). ("This fundamental distinction—between a standard, practice, or procedure with respect to voting and a policy decision which does not concern voting—reflects Congress's intent in enacting Section 5.").

this merely begs the question whether a transfer of authority constitutes a change in "election law." They glean various other supposedly pertinent comments from decisions of this Court, but these references are equally unconvincing, particularly since they come from cases where the nexus to the conduct of elections was clear.[21] Finally, we note that appellants' citations to various lower-court decisions are no more persuasive.[22]

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[21] Appellants rely on *McCain v. Lybrand*, 465 U.S. 236 (1984). *See* Br. at 40. In that case, however, it was stipulated that section 5 applied. 465 U.S. at 250 n.17. This was not surprising, since the case involved a fundamental restructuring of a county government, including the creation of a new county council, the institution of local county elections for the first time, and a massive shift of control of governmental functions from the state legislature to new county government. *Id.* at 239-40. In a footnote, the Court listed various suggestions concerning changes that might need preclearance, including "the basic reallocation of authority from the state legislative delegation to the Council." *Id.* at 250 n.17. Obviously, such a comment cannot fairly be read as a definitive statement that a shift of authority among incumbent officials, without any other change affecting voting, requires preclearance.

The United States points to *City of Lockhart v. United States*, *supra*. Br. at 13-14. There, the city had added new seats to its council. The Court held that preclearance extended to existing seats as well as the new ones, reasoning that the existing seats had been changed by their loss of voting strength and were, in any event, "an integral part of the [new] council." 460 U.S. at 131. Here again, the Court's statement hardly stands for the notion that every shift of authority among officials must be precleared. The addition of new seats to a legislative body changes the fundamental nature of the existing positions and it makes sense, in such a case, to preclear the entire new arrangement. The same cannot be said when a particular responsibility is merely transferred among existing office holders.

[22] Appellants and the United States cite four cases, three of which involved the creation of new governmental bodies with new selection procedures. *See County Council v. United States*, 555 F. Supp. 694, 700-02 (D.D.C. 1983) (shift of county governance from state legislature and governor to a new, elective county council); *Horry County v. United States*, 449 F. Supp. 990, 993-94 (D.D.C. 1978) (same); *Robinson v. Alabama State Dep't of Educ.*,

Also unavailing is the suggestion that the Court should simply defer to the government's current interpretation of section 5. While the United States is here urging reversal, it can hardly be said that this position reflects a longstanding or considered administrative interpretation of the statute. The Justice Department's regulation defining the scope of section 5, like this Court's prior decisions, is limited to matters that directly affect elections. *See* 28 C.F.R. § 51.13. This limitation, moreover, was not accidental. In promulgating the regulation in 1987, the Department stated the view that "some reallocations of authority are covered by Section 5" and gave as its sole example the "implementation of 'home rule' "—*i.e.*, a massive shift of governmental powers from state to local government. 52 Fed. Reg. 486, 488 (1987). The Department then acknowledged that "we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations to enable us to expand our list of illustrative examples in a helpful way." *Id.* Thus, after 22 years of administering the statute—during which time there have been a multitude of reallocations of authority in covered jurisdictions—the government was unwilling or unable to espouse a broad rule putting all of those changes in legal jeopardy.

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652 F. Supp. 484, 485 (M.D. Ala. 1987) (shift of administration of city schools from county board, elected county-wide, to new city board, appointed by city council). All of these changes obviously had a direct impact on the electoral process.

In the fourth case, *Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985), the court required preclearance of a shift of the power to appoint a key county board from the local legislative delegation to the governor. While this case did not involve as direct an impact on elections, the court emphasized the unique importance of the shift of power, adding that the "ordinary or routine legislative modification of the duties or authority of elected officials . . . probably [is] beyond the reach of section 5, even given its broadest interpretation." *Id.* at 178-79. As we note *infra*, the United States saw no need for preclearance in *Hardy*. *Id.* at 181.

The case-by-case application of section 5 by the Justice Department provides no greater support for such a broad rule. Although the United States now suggests that it has long interpreted section 5 to apply to cases like this one, the primary piece of evidence cited is a 1975 letter that itself involved the implementation of "home rule" in South Carolina.[23] More recently, in *Hardy v. Wallace*, 603 F. Supp. 174, 181 (N.D. Ala. 1985) (App. B to the court's opinion), the Department expressly distinguished such a "wholesale transfer of governmental power" in determining that section 5 was *not* triggered by a transfer of authority to appoint a county racing commission from the local legislative delegation to the Governor. It reasoned that while elected representatives had lost some of their authority, that change "neither remove[d] the vote from residents of [the] County, nor otherwise impede[d] or in any respect infringe[d] on resident voting rights." *Id.*[24]

In sum, appellants' proposed rule requiring preclearance of all changes in the authority of elected officials would be a clear departure not only from the natural reading of the statute but also from the current state of the law. This Court has drawn a line between changes that directly affect the conduct of elections—and there-

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[23] Br. at 16, 1a-2a. *See generally Horry County v. United States*, 449 F. Supp. at 993-94 (describing the relevant state legislation). Beyond this letter, the Government simply cites eight instances where it objected to "transfers of authority" under section 5. Br. at 16 n.6. Many of these cases also apparently involved implementation of home rule. In any event, it is unclear whether the applicability of section 5 was even disputed by the relevant governmental entity in any of these instances.

[24] If the United States now has a different view, and wants the Court to defer to that new view, it should at least demonstrate that it has thought through the consequences of its new position. Here, however, the brief filed by the government reflects no awareness of the massive scope of the expansion of the statutory mandate being proposed or the difficulties of applying section 5 outside the core context of election laws. *See* § II *infra*.

fore have an inherent potential for abridging voting rights—and changes in other aspects of governmental policy. There is no reason to alter that line here.

II. PRECLEARANCE WOULD BE AN UNWORKABLE AND UNNECESSARY REMEDY FOR DISCRIMINATION IN THE ALLOCATION OF GOVERNMENTAL POWERS.

Lacking support in the statutory language, legislative history, or relevant case law, appellants ultimately fall back on a policy argument. They contend that unless transfers of official authority are subject to preclearance, they will be used as subterfuges to frustrate the exercise of the electoral franchise by minorities. This argument does not make sense, for two reasons. First, requiring preclearance would itself be a wholly impractical, and ineffective, means of redressing reallocations of power that indirectly harm the interests of minorities. Moreover, other more suitable remedies are already available. Taken together, these factors make it even less likely that Congress intended section 5 of the Voting Rights Act to play a role in this kind of situation.

A. Appellants' Proposed Rule Is Unworkable.

As we understand it, the problem that would be addressed by the proposed expansion of section 5 arises when a shift of authority enhances the power of some officials (over whom minorities have relatively little influence) at the expense of other officials (over whom they have greater influence). *See* Br. for the United States as *Amicus Curiae* at 14 ("a jurisdiction could negate the election of a minority candidate to a governing body by taking away the official's authority and reallocating it to other officials over whom minority voters have less influence"). While such a scenario is conceivable, appellants' rule has little to recommend it as a means of dealing with this particular problem.

To begin with, it is probably impossible to overstate the magnitude of the expansion of the statutory mandate proposed here. In any given year, the number of pieces of legislation in covered jurisdictions affecting the authority of elected officials is obviously huge. For example, virtually every legislative budget for every department of a state government—along with many other pieces of substantive legislation—will, in some way, increase or decrease the discretion delegated to the Governor and thereby effect a transfer of "authority" between the legislature and the executive. Similarly, at the local level, almost any resolution that the Etowah County Commission could pass could in some way affect the exercise of executive powers delegated to one of the commissioners. Finally, almost any state law relating to some aspect of the operation of local government—*e.g.*, limiting local zoning power or enhancing local involvement in the regulation of health-care facilities—will enhance or decrease the authority of local elected officials.

All such changes, under appellants' proposed rule, would have to be precleared—in order to uncover the handful of discriminatory reallocations of power that may occur in a given year. At the same time, a multitude of changes that have occurred without preclearance since 1965 would now suddenly be subject to legal challenge. Any such changes that remain in place would not be validated by the passage of time. *See McCain v. Lybrand*, 465 U.S. 236 (1984) (involving a challenge to a 1966 electoral change).

It is difficult to believe that Congress could have intended anything like this when it passed the Voting Rights Act. The sheer volume of the matters that would have to be precleared, in the sixty-day time period specified in section 5, would require a veritable army of federal reviewers.[25] Moreover, the inherent federalism con-

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[25] *Cf.* S. Rep. No. 417, 97th Cong., 2d Sess. 15 (1982) (extension of *existing* preclearance requirements nationwide "would be an administrative nightmare for the Department of Justice"). Sig-

cerns raised by the preclearance mechanism would of course be magnified as the scope of the statute increases. *Cf. Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. at 48 (Powell, J., dissenting) ("Congress tempered the intrusion of the Federal Government into state affairs . . . by limiting the Act's coverage to voting regulations.") It is one thing to require advance federal approval of enactments in a discrete area—*i.e.*, voting—but quite another to require advance approval of every new law or practice that redistributes authority among state or local officials. Certainly, the Court should demand far more than has been offered here before attributing such a purpose to Congress.[26]

But the problem is not only the magnitude of the enlargement of the statute proposed here. A rule requiring preclearance of every reallocation of authority would also create a morass of issues concerning which types of legislation actually have this effect. Take, for example, a state law substantively modifying a governmental program. Under appellants' rule, covered jurisdictions, and ultimately the courts, would be required to determine whether such a law, by altering the terms on which the Governor is authorized to act, effected a net transfer of "authority" between the legislature and the executive.

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nificantly, the procedure for administrative preclearance was added to the proposed Voting Rights Act only late in the legislative process. Prior to that time, a declaratory judgment was the only way provided in the bill to obtain clearance for changes in voting procedures. *See Harper v. Levi*, 520 F.2d 53, 65 (D.C. Cir. 1975). Appellants would ask the Court to believe that Congress for a time contemplated requiring a separate *lawsuit* prior to every change in the authority of officials in covered jurisdictions.

[26] In *Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. at 38-39, the Court pointed out that Congress had reenacted section 5, without substantive change, after the Court had adopted an expansive interpretation covering all matters affecting elections. Such an argument for legislative ratification cannot be made here, however, since no prior case could have alerted Congress to the extreme statutory interpretation now being proposed.

Similarly, as noted above, Etowah County's commissioners exercise various executive responsibilities for operations of road shops, the county courthouse, and the county farmers' market. The County might choose to switch these assignments or to delete one of them by hiring a professional manager answerable to the County Commission. It might merely modify the delegation of authority by requiring Commission approval of specific expenditures exceeding a given dollar amount. Here again, someone would have to determine whether the net result was a reduction in the "authority" of a given commissioner for purposes of section 5.

All of these problems would be the direct result of cutting section 5 loose from its original moorings as a measure regulating elections. The Court has now spent more than two decades working out the scope of the preclearance requirement in the electoral field. Under the approach proposed here, it would face the almost insuperable task of defining which changes in law or practice constitute reallocations of authority.

Appellants' proposed rule not only would create enormous burdens and uncertainties but also would fail to serve, in a coherent way, its stated purpose of ferreting out those few transfers of authority that may constitute subterfuges aimed at diluting the influence of minority voters. Appellants and the United States, while asking the Court to expand section 5 dramatically, say very little about how reallocations of authority should be evaluated under a provision that bars all changes having a purpose *or effect* of abridging the right to vote.[27] Such a broad standard may be workable in reviews of electoral changes.[28] It cannot, however, be intelligibly applied to reallocations of governmental authority.

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[27] *See* 42 U.S.C. § 1973c (change may be approved only if it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color").

[28] It has been argued, however, that the expansion of the scope of section 5 has already created difficulties with application of the

The United States suggests at one point that the Justice Department could make some assessment of the "responsiveness" of particular officials to minority concerns and would invalidate any new laws that have the effect of moving power from more responsive to less responsive officials. Br. at 20. But it is inconceivable that Congress intended to authorize the Department, in its unreviewable discretion,[29] to evaluate state and local legislation based on this kind of subjective standard. Moreover, it hardly makes sense to hinge the validity of a governmental restructuring on the attitudes of the particular individuals holding office at a given time.

A more objective approach would be to compare the racial composition of the constituencies of the officials or bodies losing and gaining power in a given reallocation of authority. The United States, however, expressly rejects such a test, arguing that preclearance should be required even where the relevant constituencies are identical. Br. at 19-20.

In any event, this version of an "effects" test would have consequences that make it equally unlikely that Congress meant to authorize it. It would freeze in place all distributions of authority involving officials with significantly different constituencies. A covered jurisdiction would be barred from moving duties or power, *for whatever reason*, from an official with more minority constituents to one with fewer. Thus, for example, if blacks were a majority of the voters in a particular county but not in the entire state, the effects test would prevent the state legislature from withdrawing any authority previously granted to that county's government. At the county level as well, regardless of the reasons or circumstances, authority could be transferred only in one direction—toward

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effects test, particularly in the area of assessing annexations. *See* Blumstein, *supra*, 69 Va. L. Rev. at 680-88.

[29] *See Morris v. Gressette*, 432 U.S. 491 (1977).

those commissioners who happened to have more minority constituents.

B. There Are Ample Alternative Remedies Available if Governmental Powers Are Reallocated for Discriminatory Reasons.

One final factor is also critical in determining the intent of Congress regarding the scope of section 5. Congress knew that this provision was not the sole available means of dealing with discriminatory acts by state and local government. In particular, it was fully aware that such discrimination may be redressed through conventional lawsuits. It created a discrete additional remedy for one problem—discrimination in voting—but did not intend that remedy to occupy the field and address all of the possible types of discrimination by a government. *See Allen v. State Bd. of Elections*, 393 U.S. at 556 (Congress "drafted an unusual, and in some aspects a severe, procedure for insuring that States would not discriminate on the basis of race in the enforcement of their voting laws"). Thus, here, the district court expressly left open appellant Presley's challenge to the County's budgetary procedures and practices under the Fourteenth Amendment and Title VI, 42 U.S.C. § 2000d. J.S. App. A-20 n.18.[30]

These alternative remedies provide a far superior means of handling the problem that underlies appellants' argument in this case. If the concern is that power or resources will be transferred based on the race of an official or of his constituents, then appropriate plaintiffs can prove such facts and obtain appropriate relief. *Cf. Vil-*

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[30] The district court also left open the claim brought under section 2 of the Voting Rights Act. If the Court affirms the decision below, the validity of that claim will depend on whether section 2 can be read to have a broader scope than section 5, in those cases where it can be shown that a reallocation of power was designed to abridge voting rights.

lage of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977) (barring intentional discrimination in zoning); *Anderson v. Martin*, 375 U.S. 399, 404 (1964) (barring direct or indirect state efforts to discourage black candidates or to encourage racially motivated voting); *Hawkins v. Town of Shaw, Mississippi*, 437 F.2d 1286 (5th Cir. 1971) (barring racial discrimination in provision of paving and other municipal services).

Appellants' favored remedy, by contrast, would raise all of the problems already outlined—including the application of an "effects" test that makes no sense in this context. Moreover, it would likely be an ineffective means of preventing racially motivated transfers of authority. It is absurd to suggest that the Justice Department—faced with tens of thousands of submissions and a short time deadline—could successfully uncover the handful of cases where transfers of authority among officials constitute deliberate efforts to lessen minority influence.

In sum, consideration of the alternative remedies available for dealing with the problem that appellants seek to address makes it all the less likely that Congress intended section 5 to reach this far.

III. REQUIRING PRECLEARANCE IN THIS CASE WOULD BE PARTICULARLY INAPPROPRIATE, SINCE THE TRANSFER OF AUTHORITY AT ISSUE COULD NOT, BY ITS VERY NATURE, HAVE A SUBSTANTIAL IMPACT ON VOTING RIGHTS.

Appellants, in arguing for application of section 5 to reallocations of authority, make the assumption that all such changes have the same potential for abridging voting rights. The flaws in that assumption are revealed by an examination of two key features of the transfer of authority at issue here. First, this case involves the revocation by a legislative body of a discretionary delegation

of executive authority. Second, contrary to the assumption of the district court, this case does not involve a shift of power among officials with different constituencies. Because of these features, the transfer of authority could not, in principle, affect the interests of voters.[31]

A. Preclearance Should Not Be Required Where a Legislative Body Merely Alters the Amount of Discretion Delegated to an Executive Official.

Where, as here, a legislative body merely reduces the amount of discretion previously delegated by it to an executive official, it makes little sense to perceive any potential for abridgement of the voting rights of the executive official's constituents. The reason is that a revocable delegation of a particular function does not constitute a transfer of ultimate authority. A legislative body may choose, for a time, to limit its own involvement in the details of carrying out a particular function, but it can always step in to correct any perceived errors of administration. The "balance of power" between the legislature and the executive remains the same. It follows that, regardless of any changes in the level of delegated authority, voters retain the same power to influence the course of public policy, because the electoral process for selecting those with final authority is unchanged.[32]

This case illustrates this principle well. Under Alabama law, control over the allocation of road funds and the

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[31] Thus, even if the court were inclined to leave open the possibility that some types of reallocations of authority may require preclearance, it would not make sense to extend the requirement to this type of case.

[32] To be sure, we would not contend that a direct change in the procedures for electing an executive official would be exempted from preclearance on the ground that the official exercises only delegated authority. In such a case, the linkage to voting rights is clear. It makes sense to consider the locus of ultimate authority, however, where the claim is that a transfer of *power* has a *derivative* impact on voting rights.

supervision of road repairs and improvements belongs to the Etowah County Commission as a body. Ala. Code §§ 11-8-3, 23-1-80 (Michie 1990). Prior to 1987, some of these functions were delegated to individual commissioners. However, the Commission could, at any time, have overruled any spending decision made by an individual commissioner. It simply chose, in practice, to leave most of the administrative details to individual delegees.

After the common-fund resolution, the Commission became more involved in those details, voting collectively on county-wide spending priorities. Appellants argue that this change deprived individual commissioners of significant autonomous authority. This is true in one sense, but it is specious to maintain that this change entailed a transfer of electoral "influence" from voters in each district to voters in the County as a whole. Prior to the resolution, an individual commissioner administering road funds in his district acted essentially as an agent of the entire Commission. Thus, the decisive electoral "influence" was always in the hands of those who vote for the entire Commission.[33]

Moreover, requiring preclearance in this kind of case would be pointless, since the legislature could always achieve the same result by another means that did not formally reallocate authority—*i.e.*, by cutting the executive's budget. This was the factor emphasized by the district court, which noted that an individual commissioner's "power to set the internal spending priorities

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[33] For these reasons, the linkage to voting rights here is arguably *more* attenuated than in *Lucas v. Townsend*, where, as noted above, this Court affirmed a ruling that preclearance was not required. 110 S. Ct. 858 (1990). *Lucas* is similar to this case because it involved an action by a public body affecting the degree of budgetary discretion exercised by others: voters were denied the right to pick and choose among capital projects when they were proposed as part of a single referendum question. There are two key differences, however. First, the public body's action had a direct impact on an *election*—*i.e.*, the referendum. Second, the voter's decision in the referendum was not an exercise of revocable delegated power.

of a given quantum of budget authority pales dramatically in comparison to the power to allocate the *amount* of such budget authority in the first place." J.S. App. A-19. Even assuming, as appellants argue, that the purpose of the common fund resolution could have been to assure that spending priorities would be established for the benefit of the white majority in the county at the expense of the black majority in appellant Presley's district, precisely the same result could have been achieved without any formal "reallocation" of executive authority. The district-by-district budgeting system could have been retained and funding for appellant Presley's district could either have been cut altogether or conditioned on his informal agreement to spend the money in ways favored by the other commissioners.[34]

Thus, unless the Court is prepared to take yet another giant step—requiring preclearance of every change in budgetary priorities that might have the effect of diminishing the power of an executive official[35]—there would

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[34] In reality, of course, this entire theory about the motives of the other county commissioners makes no sense. Appellant Presley's district contains only .3% of county road mileage. J.A. 72. Prior to 1987, road funds, which could only be spent on road work, had been allocated to districts based roughly on their percentage of that road mileage. Hitt Depos. at 21. Thus, in fiscal year 1987-88, if the existing system had been left in place and Presley's district had received its proportional share of funds, it would have received only about $3000 out of a total county road budget of more than $1 million. *See* J.A. 72. There was therefore no real need to create a new system in order to divert funds to other areas. In any event, the record reflects that, in that year, appellant's district actually received seven times its proportional share of road funds. *See id.*

[35] *But see* Br. of the United States as *Amicus Curiae* at 12, *Board of Pub. Educ. and Orphanage for Bibb County v. Lucas*, 111 S. Ct. 2845 (1990) (No. 90-1167) ("The Voting Rights Act protects the right to vote; it does not address the content of substantive legislation unrelated to voting, such as what budget to approve or what programs to fund.").

be little purpose in a rule requiring federal review of explicit changes in the level of authority delegated by a legislature. Under that rule, the multitude of routine changes in delegated power would be easily approved. In those few cases where such changes have racial motives, however, legislators could simply act in a different way, by reallocating money rather than power. In such an instance, the only remedy would be the one that appellants should be required to pursue here—a lawsuit proving racial discrimination.

B. Preclearance Cannot Be Required Where Power Shifts Among Officials with the Same Constituencies.

In its opinion, the district court made a persuasive case for the principle that voting rights cannot be affected by a transfer of power among officials or bodies with the same voting constituency. J.S. App. A-10 to A-14. Unless there is a difference in the voter pool (or voting procedures) for different offices, it is hard to see how voters can gain or lose influence when power moves from one office to another. For this reason as well, it is specious to treat all transfers of power as if they were of equal concern.

As already noted, the United States argues that a shift of authority among officials with the same constituency should be reviewed, and may be invalidated, under section 5. In particular circumstances, it suggests, such a change may move power from a body that happens to be more responsive to minority concerns to one that is less responsive [36] or may have some other discriminatory purpose,

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[36] Thus, it hypothesizes that minorities may have succeeded in electing a mayor of their choice "because of special circumstances" only to see power shifted to the city council. Br. at 19. It also describes an actual refusal to preclear a transfer of power from one county-based body (the legislative delegation) to another (the county council) based on findings that the legislators had historically been more responsive to minority concerns. Br. at 20.

such as retaliation against a given individual.[37] But such possibilities provide no basis for requiring preclearance under the Voting Rights Act. The sole purpose of that Act is to guarantee equal voting rights. As long as such equality is preserved—as it must be when power shifts among officials with the same constituency—then the possibility that some officials may be less attentive to minority concerns, or the possibility that the legislature may have some other illegal motive, provides no basis for requiring preclearance.[38]

The district court chose not to apply this principle to the Etowah County common fund resolution. It apparently reasoned that the resolution withdrew power from two new commissioners from single-member districts and granted that authority to the Commission, which of course has a county-wide constituency. For two reasons, however, it is clear that, in so holding, the court was simply using an incorrect "benchmark."

First, under the statute and implementing regulations, the preclearance requirement is triggered only by initiation of a new voting procedure "different from that in force or effect on" the applicable benchmark date—here, November 1, 1964. 42 U.S.C. § 1973c; 28 C.F.R. § 51.2 (defining "change affecting voting"). In Etowah County, on that benchmark date, all road operations were in the control of commissioners elected at large. Thus, if a different constituency is required before a transfer of authority can be deemed a "change affecting voting," the proper comparison is between the situation after August 1987 (when the entire Commission set funding priorities)

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[37] Br. at 20 (citing Mobile and San Patricio cases).

[38] *See* Br. of the United States as *Amicus Curiae* at 10, *Lucas v. Townsend, supra* ("The statute protects minorities against passage of substantive legislation adverse to their interests . . . only indirectly by protecting the effectiveness of their vote.").

and November 1, 1964 (when individual commissioners with the same county-wide constituency played this role).[39]

Moreover, even if the proper comparison were between the common fund resolution and the immediately preceding practices, it still would be true that there never was a relevant change in the constituency of those in control of road funds. As noted above, prior to 1986, all Etowah County commissioners were elected at large. Each administered a particular district's road budget. Pursuant to a consent decree, two new commissioners, including appellant Presley, were elected from single-member districts in December 1986. When they took office, they did not immediately receive allocations of road funds to administer in their districts. The old system, administered by the four incumbent commissioners, remained in place on an interim basis. Hitt Depos. 74-75. The common fund resolution then had the effect of transferring control over expenditures from the four incumbent at-large commissioners to the entire Commission.[40] In sum, at no time was control over expenditure of funds exerted by any official or body other than those elected by all county voters. To the contrary, the common fund resolution merely maintained the ability of voters county-wide to influence all road expenditures.

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[39] The district court held that a "change" should be defined to include any departure from a previously precleared practice. J.S. App. A-9 to A-10. In effect, therefore, it held that the benchmark for triggering the statute itself may evolve. This holding was based on three district court decisions and on a citation to another regulation, 28 C.F.R. § 51.54(b)(1), which merely provides that in assessing the *merits* of a covered change, the benchmark is the most recent previous practice that has been precleared. These authorities do not justify ignoring the plain terms of the statute.

[40] The relevant comparison, for purposes of section 5, is between the new practice and the actual practice as it existed prior to the change. *See City of Lockhart v. United States*, 460 U.S. at 132-33.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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August 30, 1991